No. 87-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO, INC.

Petitioner,

-- VS. --

RICKY HASBROUCK, d/b/a RICK'S TEXACO, et al.

Respondents.

MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF TEXACO, INC.'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: July 14, 1988

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MOTION OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF TEXACO, INC.'S PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 36.1, the National Association of Convenience Stores (NACS) and the Society of Independent Gasoline Marketers of America (SIGMA) move for leave to file an amici curiae brief in support of the petition of Texaco, Inc. for a writ of certiorari. The consent of petitioner Texaco, Inc. and respondents Ricky Hasbrouck *et al.* to the filing of this brief has been requested. Texaco gave its consent but the respondents declined to grant their consent.

SIGMA is a national trade association of 297 independent marketers of motor fuels. SIGMA members operate as wholesalers and chain retailers in all 50 states, selling petroleum products through more than 9,800 retail outlets which they own and supplying products to an additional 10,400 retail outlets owned by other companies. NACS is the national trade association of the convenience store industry. Its 1,312 members operate over 53,000 convenience stores, more than 59 percent of which sell gasoline. Many NACS members also operate as gasoline wholesalers.

The decision below, if left unreviewed, will have a serious adverse impact on the members of NACS and SIGMA. The court of appeals' decision calls into question the legality of a manufacturer's granting class of trade discounts to middlemen in the distribution chain, a longstanding pricing practice that is essential

to the viability of wholesalers and jobbers. As wholesalers, SIGMA and NACS members cannot resell profitably to retailers if manufacturers sell to them at the same prices they charge direct-buying retailers. The decision below held that a class of trade discount may violate the Robinson-Patman Act, 15 U.S.C. § 13(a), if it is not cost-based and if it exceeds the wholesaler's costs of wholesaling. This ruling conflicts with a substantial body of precedent holding that class of trade discounts granted to wholesalers do not violate the Robinson-Patman Act in the absence of direct competition between the wholesalers and direct-buying retailers. Moreover, the cost-based discount regime required by the court of appeals would be utterly impractical and would leave motor fuels refiners no real choice but to sell to all customer classes at the same price, resulting in the elimination of gasoline wholesalers and jobbers.

SIGMA and NACS are more familiar than petitioner Texaco, Inc. with the practical problems raised by the court of appeals' rule requiring precise equivalence between each wholesaler's discount and its costs of wholesaling. Many factors affect a wholesaler's costs of wholesaling and these factors are largely within its control as an independent businessman. A gasoline wholesaler's costs are not known by its suppliers. SIGMA and NACS are better situated than Texaco to say whether their members would be able to develop the detailed daily cost data required by the decision below and share it with their suppliers, which are also their competitors. SIGMA and NACS are also in a better position than Texaco to inform the Court of the effects that the decision below would have on gasoline wholesalers. SIGMA and NACS believe that

the likely result of the decision below will be the elimination of class of trade discounts. With respect, the impact of that development would be more immediately felt, and thus is better understood, by SIGMA and NACS than Texaco.

The proposed brief of SIGMA and NACS is attached.

Respectfully submitted,

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BRIEF OF AMICI CURIAE SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA AND NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Society of Independent Gasoline Marketers of America (SIGMA) and the National Association of Convenience Stores (NACS) respectfully submit this amici curiae brief in support of Texaco, Inc.'s petition for a writ of certiorari.

INTEREST OF AMICI CURIAE

The Society of Independent Gasoline Marketers of America is a national trade association of 297 independent marketers of motor fuels. SIGMA is the principal spokesman for the independent marketing segment of the petroleum industry. SIGMA members sell refined petroleum products in all 50 states through more than 9,800 branded and unbranded retail outlets which they own and operate. In addition, two out of every three SIGMA members operate as wholesalers. SIGMA members supply petroleum products to some 10,400 branded and unbranded retail outlets owned by other companies. In 1986 SIGMA members sold 18.4 billion gallons of motor fuels, which represented approximately 14 percent of all motor fuels sold in the United States.

The National Association of Convenience Stores is the national representative of the convenience store industry. The 1,312 members of NACS operate over 53,000 convenience stores; 59 percent of those stores sell gasoline. In 1987 convenience stores had $20.5 billion in retail gasoline sales. NACS members are

also engaged in gasoline wholesaling, supplying both branded and unbranded outlets owned by other companies.

Wholesalers and jobbers play important roles in the marketing of motor fuels in the United States. Over 50 percent of the gasoline and over 60 percent of the diesel fuel sold at retail in the United States passes through a distributor on its way to the retail outlet.[1] Approximately two-thirds of all gasoline dealers are supplied by wholesalers or jobbers.

The members of NACS and SIGMA are independent marketers. They purchase fuels from the major oil companies, from independent refiners, from jobbers, and on the spot market. The independent marketing segment has been described as "the most competitive factor in the industry at the wholesale and retail levels." *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 383 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982).

The interest of SIGMA and NACS in this case stems from a simple economic reality: SIGMA and NACS members cannot stay in business as gasoline wholesalers if they are charged the same price as retailers. The major oil companies and the independent refiners, which are the primary sources of supply for SIGMA and NACS members, can and do sell directly to dealers. SIGMA and NACS members could not resell profitably to retail outlets if they were charged the same price as direct-buying dealers, because they must mark up the price in order to cover their costs and make a profit. Thus, in gasoline marketing as in many other

[1] Petroleum Marketers Association of America, *1986 Petroleum Marketing Databook*.

industries it has long been customary for manufacturers to sell at graduated discounts to customers according to their level in the distribution chain, with the distributors at the level nearest the manufacturer paying the lowest price and retailers, who are farthest from the manufacturer, paying the highest price.

The decision below would have an enormous adverse impact on SIGMA and NACS members. The court of appeals held that Section 2(a) of the Robinson-Patman Act, 15 U.S.C.. § 13(a), may be violated if a manufacturer grants a discount to a wholesaler that exceeds the cost of the wholesaling functions it performs. The court of appeals expects manufacturers to comply with its ruling by constantly adjusting the size of each wholesaler's discount so that it matches the wholesaler's costs, but that would be completely impractical. A supplier cannot know each customer's costs. Certainly it is not the practice of SIGMA and NACS members to share their most sensitive day-to-day cost data with their suppliers, with whom they often directly compete.

Since the cost-based discount system envisioned by the court below is unworkable, a manufacturer could avoid Robinson-Patman liability only by monitoring and controlling its wholesalers' resale prices, thereby exposing itself and its customers to Sherman Act liability, or by eliminating class of trade discounts and selling to all classes of trade at the same price. The latter result, which seems the most likely outcome if the decision below stands, would be disastrous for the members of NACS and SIGMA and would also cause severe harm to retail station operators who are supplied by wholesalers and jobbers. Elimination of class of trade discounts would render gasoline wholesalers

and jobbers obsolete and deprive consumers of an important source of competition.

SUMMARY OF THE ARGUMENT

The decision below holds that a manufacturer may violate the Robinson-Patman Act if its price to wholesalers is less than its price to direct-buying retailers. The decision is at odds with Congressional intent and precedent. It is unsound, moreover, as a matter of business practicality and antitrust policy.

1. It would be impossible for manufacturers to tailor each wholesaler's discount to its costs of wholesaling. A manufacturer does not know what these costs are and it is unreasonable to require wholesalers to share distribution cost information with their suppliers, which are frequently their competitors as well.

2. The right of a manufacturer to sell to wholesalers at a uniform lower price than it charges to retailers has been firmly established by the courts and the Federal Trade Commission.

3. In order to ensure that wholesalers did not pass on their discounts to their retailer customers, manufacturers would be required to control wholesalers' resale prices, in violation of Section 1 of the Sherman Act, 15 U.S.C.. § 1.

4. Faced with the risk of violating the Robinson-Patman Act on the one hand and the Sherman Act on the other, manufacturers logically would sell at a uniform price to wholesalers and retailers, which would force wholesalers out of business, harming not only wholesalers but also dealers and consumers.

ARGUMENT

I. THE COURT OF APPEALS' RULE IS IMPRACTICAL AND WOULD REQUIRE DISCRIMINATION AMONG WHOLESALERS

In order to avoid Robinson-Patman violations, the decision below requires manufacturers either to maintain a strict cost/discount equivalency for each customer or to control in some manner wholesalers' resale prices in order to prevent them from passing on the discount.

A pricing scheme in which each wholesaler's discount always precisely matches its costs cannot exist in the real world. Fuel refiners do not and cannot know each wholesaler's costs of wholesaling. Such costs vary from wholesaler to wholesaler and from day to day and are affected by a host of factors within each wholesaler's discretion as an independent businessman. For example, a fuel wholesaler who owns a bulk terminal will have different costs than one who leases a terminal; a wholesaler who transports products in his own trucks will have different costs than one who uses common carriers; and a wholesaler who makes an investment in training a large staff will have different costs than one who does not. Other factors affecting wholesaling costs include: how much and what grades of product are maintained in the wholesaler's inventory; whether and to whom the wholesaler extends credit; and how often deliveries are made. At any given time, moreover, a wholesaler may be selling fuel that came from more than one refiner, making it very nearly impossible to apportion wholesaling costs among the various suppliers.[2]

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[2] The Federal Trade Commission briefly flirted with a rule

Gasoline wholesalers normally do not maintain the detailed daily cost records that would be required to comply with the court of appeals' cost/discount equivalency rule, and even if they did they would be loath to share them with their suppliers. SIGMA and NACS members are in direct competition with the integrated gasoline refiners in selling to retailers and consumers. It is unrealistic, not to mention anticompetitive, to require SIGMA and NACS members to share the most intimate details of their operating costs with their competitors.

Even if a manufacturer could know each wholesaler's costs and adjust its price to the wholesaler accordingly, sales to competing wholesalers at different prices would themselves be actionable discrimi-

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that would have limited the size of permissible wholesale discounts to the wholesaler's costs, Doubleday & Co., 52 F.T.C. 169 (1955), but it soon rejected that approach. Mueller Co., 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). The Commission emphasized the impracticability of such a rule in its *Boise Cascade* decision:

> "The costs of the manufacturer's customers in performing certain functions will surely vary, depending on differences in customer operations, efficiency, location, and product mix. . . . A manufacturer almost certainly could not know in detail each customer's costs to perform certain functions. Granting the different discounts based on guesses about individual customer costs could easily lead to discriminatory prices. Even if the discounts accurately reflected each customer's costs, under any variable discount system the less efficient firms with higher costs would receive higher discounts—an economically unfortunate reversal of desired incentives."

Boise Cascade Corp., 107 F.T.C. 76, 212 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988) (footnote omitted).

nations under Section 2(a). The statutory cost justification defense would not absolve such discriminations, since that defense must be based on differences in the manufacturer's costs, not the customers' costs. *See Boise Cascade Corp.*, 107 F.T.C. 76, 212 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). The court below thus requires manufacturers to risk liability for discriminating among wholesalers in order to avoid liability for discriminating at the retailer level under its novel interpretation of the Act.

II. DISCOUNTS BASED ON THE CUSTOMER'S LEVEL OF TRADE DO NOT VIOLATE SECTION 2(a)

Discounts based on the customer's level of resale have been a characteristic feature of American commerce since the turn of the century, if not earlier. *See* F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 3-6 (1962). Such discounts are a traditional means by which suppliers reward customers for assuming the burdens of storing and distributing their products and providing service to accounts at lower levels. Practical economics, moreover, require that wholesalers and jobbers pay a lower price than retailers, because middlemen must mark up the price in order to cover their expenses and earn a profit.

Independent wholesalers, who felt threatened by what were perceived as undeserved discounts granted to powerful direct-buying retailers, provided the primary impetus for the passage of the Robinson-Patman Act.[3] The Act's unmistakable purpose was to protect

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[3] The original Patman bill was written and shepherded through Congress by the counsel for the United States Wholesale Grocers

wholesalers and small retailers and to preserve the then-existing multi-tiered products distribution system. Not surprisingly, nothing in the text or legislative history of the Act supports the view that Congress intended radically to overhaul the economy by outlawing traditional class of trade discounts.

It is well established that a discount given to wholesalers but not to retailers does not violate the Act regardless of its size because of the absence of competition between the recipients of the higher and lower prices. As the Federal Trade Commission has stated:

> "Over the years in the chain of distribution from the producer to the ultimate consumer, various groups have come into being, each having a particular status and performing its particular function. Familiar examples are wholesalers and retailers. Prices to these groups take into account their status and the part they play in distribution by virtue of that status. Characteristically, the members of each group compete with each other but not with members of a different group."
>
> "While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result."

Association, with assistance from drug wholesalers and the National Food Brokers' Association. J. Palamountain, *The Politics of Distribution* 197-203 (1955).

General Foods Corp., 52 F.T.C. 798, 824 (1956). Injury to competition could result, the Commission went on to say, if customers nominally in different functional classes were in direct resale competition. *Id.* at 824-25. The Commission has reiterated the legality of a manufacturer's selling at lower prices to wholesalers than to noncompeting retailers in numerous decisions, most recently *Boise Cascade Corp.*, 107 F.T.C. 76, 199, 214-15 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). Other decisions confirming the legality of charging lower prices to wholesalers than to retailers include *White Industries, Inc. v. Cessna Aircraft Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,992 (8th Cir. 1988); *Dart Industries, Inc. v. Plunkett Co. of Oklahoma, Inc.*, 704 F.2d 496, 499-500 (10th Cir. 1983); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Energex Lighting Industries, Inc. v. North American Phillips Lighting Corp.*, 656 F. Supp. 914, 919-20 (S.D.N.Y. 1987); and *Roorda v. American Oil Co.*, 1981-1 Trade Cas. (CCH) ¶ 64,153, at 76,911 (W.D.N.Y. 1981).

Where a manufacturer uses a controlled wholesaler to funnel discriminatory prices to retailers, the courts and the Commission have used the "indirect purchaser" doctrine to hold the manufacturer responsible for injuries suffered by disfavored retailers. *See, e.g., Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 83-84 (6th Cir. 1981). Application of the indirect purchaser doctrine has been carefully limited, however, to situations where the manufacturer dictates the

terms of the transaction between the wholesaler and the retailer, for "[i]f the seller cannot in some manner control the sale between his immediate buyer and a buyer once removed, then he has no power by his own action to prevent an injury to competition." *Purolator Products, Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968).[4]

The court below did not, and could not, apply the indirect purchaser doctrine on the record before it. In a remarkable break with precedent, the court held that the absence of direct competition between wholesalers and retailers was irrelevant if it was "foreseeable" that wholesalers, in their independent pricing decisions, would pass on part of the discount to their customers. *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1988). This approach would accomplish something Congress clearly did not intend: the abolition of class of trade discounts.[5]

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[4] In his 1976 monograph on the Act, then-Professor Richard Posner noted the clear legality of class of trade discounts except where the requirements of the indirect purchaser doctrine are met:

> "Section 2(a) is also limited in its terms to a discrimination between *purchasers* from the seller. . . . For example, a seller might be selling the same product (1) directly to a retailer and (2) to a wholesaler reselling to a retailer who is in competition with the direct-buying retailer. If there is discrimination between the two retailers, it is actionable under the statute only if the retailer purchasing through the wholesaler may somehow be deemed an indirect purchaser from the seller."

R. Posner, *The Robinson-Patman Act* 36 (1976) (emphasis in original).

[5] The only decision indicating that class of trade discounts could violate the Act is Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949). There, the court of appeals modified and affirmed an order which included a provision that prevented Standard Oil from selling to jobbers at a discount if it knew the discount would be passed on, enabling the jobbers' customers to undercut direct-buying dealers. The order ultimately was vacated on the ground that the meeting competition defense had been established. 340 U.S. 231 (1951), *on remand*, 49 F.T.C. 923 (1953), *rev'd*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958). The government eventually recognized that the order required Standard Oil to engage in resale price maintenance and it repudiated the resale price maintenance provision when the case reached the Court for the second time. FTC Reply Brief at 31-32, FTC v. Standard Oil Co., 355 U.S. 396 (1958). The order was criticized by the 1955 Attorney General's Committee To Study The Antitrust Laws. The Committee pointed out that it "contradicts basic antitrust policy" to make a manufacturer responsible for the resale prices of its independent distributor. *Report Of Att'y General's Nat'l Comm. To Study The Antitrust Laws* 206 (1955).

III. THE DECISION BELOW IS INCONSISTENT WITH THE PER SE BAN AGAINST RESALE PRICE MAINTENANCE

The decision below allows treble damage liability to be imposed on manufacturers for injuries caused by the independent pricing decisions of their wholesaler customers. Since it is impossible for manufacturers to know their wholesalers' costs, a manufacturer that wishes to grant discounts to wholesalers can be safe from liability under the decision below only if it can find another way to prevent the discount from being passed on. If class of trade discounts granted to independent wholesalers are deemed capable of unlawfully injuring direct-buying retailers, "the inevitable Robinson-Patman remedy (short of outright elimination of intermediate distributors whenever direct sales are also made) must be the supplier's control of [the

wholesaler's] resale price." F. Rowe, *Price Discrimination Under The Robinson-Patman Act* 204 (1962).

Resale price maintenance agreements are illegal *per se*, *Business Electronics Corp. v. Sharp Electronics Corp.*, __ U.S. __, 108 S.Ct. 1515, 1519 (1988); thus, it is out of the question for manufacturers to grant discounts to wholesalers on the condition that the wholesalers not charge their customers less than the manufacturer charges direct-buying retailers. Less direct means of controlling wholesalers' resale prices would also entail serious Sherman Act risks. The existence of a resale price maintenance conspiracy may be inferred from evidence that a manufacturer disciplined customers whose resale prices were too low by raising its price to them. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 37-41 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972) (resale price maintenance agreement established by denial of competitive allowance in retaliation for customer's failure to adhere to suggested resale prices); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964) (withdrawal of rebate when customer deviated from suggested resale prices was unlawful coercion). Surveillance or monitoring of wholesalers' resale prices could support an inference of resale price maintenance,[6] and

[6] *See, e.g.*, Bender v. Southland Corp., 749 F.2d 1205, 1212-1213 (6th Cir. 1984) (franchisor's requirement that franchisees report unchanged actual retail prices whenever suggested retail prices changed would be basis for inferring resale price maintenance agreement); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 716 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969) (manufacturer requests for reports on sales below suggested prices); *cf.* Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380, 393 (7th Cir. 1984) ("[s]urveillance

evidence that actual or threatened termination was used to secure wholesalers' adherence to a particular resale price floor could also lead to Section 1 liability.[7]

In making manufacturers responsible for independent wholesalers' pricing decisions, the decision below exposes manufacturers and wholesalers to grave risks under the Sherman Act. It would be hard to blame a manufacturer which decided to eliminate wholesaler discounts or which stopped selling to wholesalers altogether rather than cross the Sherman Act minefield laid down by the court of appeals.

IV. ELIMINATION OF CLASS OF TRADE DISCOUNTS WOULD HARM COMPETITION AND CONSUMERS

The multi-tiered gasoline pricing system as it currently exists in the United States makes it possible for independent gasoline marketers to compete aggressively with the major, vertically integrated oil companies and gives retail station operators sources of supply other than the major oil companies and refineries. The members of SIGMA and NACS are industry leaders in efficiency, innovation, and cost-cutting, but they cannot operate as wholesalers if they must pay the same prices as retailers. The lower court's ruling leaves no practical or safe means for suppliers to grant class of trade discounts to wholesalers and jobbers and thus would result in a single price being charged to all customers regardless of their level in the distribution chain. There would be

could in some circumstances. . . be the stick that forced dealers into a tacit understanding" that they would not buy from competing suppliers).

[7] *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 765-67 (1984).

no place for gasoline wholesalers and jobbers in a single-price system. The irony of this outcome, given the Act's origins as a bill to ensure the continued existence of wholesalers, should be apparent.

Dealers and consumers would be the real losers if the decision below stands. Retail station operators depend heavily on wholesalers and jobbers for supplies of fuel at competitive prices and independent marketers provide strong wholesale and retail price competition for the major oil companies.[8] If wholesalers and jobbers were charged the same prices as direct-buying dealers, they could not supply dealers at prices that would enable them to compete with direct-supplied outlets and thus could not stay in business. The elimination of independent gasoline wholesalers would mean fewer choices and higher prices for consumers and retail dealers.

CONCLUSION

For all the reasons set forth above, SIGMA and NACS urge that Texaco's petition for a writ of certiorari be granted.

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[8] *See generally Report of the Federal Trade Commission on Mergers in the Petroleum Industry* 287-90 (1982).

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